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# Crimes

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# Crimes

## Crimes; witness intimidation

Government Code §25360 (new); Penal Code §§136.5, 152, 171b, 1170.15, 13826.4, 13826.5, 13826.6 (new); 136.1, 653f, 1203.06, 1328, 1387, 13826, 13826.1, 14010 (amended); 13826.4 (amended and re-numbered as 13826.7).

AB 2682 (Torres); STATS. 1982, Ch 1093

Support: Department of Finance; Los Angeles County Board of Supervisors; Los Angeles County District Attorney; Office of Criminal Justice Planning

AB 2683 (Torres); STATS. 1982, Ch 637

Support: California District Attorneys Association; California Peace Officers Association; Los Angeles County

AB 2685 (Torres); STATS. 1982, Ch 1097

Support: California Peace Officers Association; Department of Finance; Los Angeles County District Attorney

AB 2686 (Torres); STATS. 1982, Ch 1098

Support: California Peace Officers Association; Department of Corrections; Office of Criminal Justice Planning

AB 2688 (Torres); STATS. 1982, Ch 1096

Support: California Peace Officers Association; Los Angeles County Board of Supervisors; Los Angeles County District Attorney

AB 2689 (Torres); STATS. 1982, Ch 1099

Support: Los Angeles County Board of Supervisors; Los Angeles County District Attorney

AB 2690 (Torres); STATS. 1982, Ch 1101

Support: Department of Finance; Office of Criminal Justice Planning

AB 2691 (Torres); STATS. 1982, Ch 1100

Support: Department of Finance; Los Angeles County Board of Supervisors; Los Angeles County District Attorney

Chapters 637, 1093, and 1096-1101 were enacted in an apparent attempt to deter gang violence by providing protection for witnesses.<sup>1</sup>

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1. See Assemblyman Art Torres, Newsletter, February 19, 1982 (copy on file at the *Pacific Law Journal*); CAL. PENAL CODE §§136(2), 1334.1(a); *People v. Broce*, 76 Cal. App. 3d 74, 76, 142 Cal. Rptr. 628, 630 (1977); *People v. McAllister*, 99 Cal. App. 2d 37, 40-41, 277 P.2d 1082 (1929); 2

Chapter 1093 states the intent of the Legislature to support the efforts of government and community agencies to combat gang terrorism and to have these agencies cooperate to help witnesses.<sup>2</sup> Chapters 1096, 1097, 1098, 1100 and 1101 aid witnesses who intend to testify by establishing a maintenance facility for the protection of witnesses,<sup>3</sup> prohibiting behavior meant to intimidate witnesses<sup>4</sup> and changing court procedures to promote witness testimony.<sup>5</sup> Chapters 637, 1098, 1099, and 1101 increase penalties for witness intimidation by providing for stricter prosecution,<sup>6</sup> increased sentences<sup>7</sup> and denial of probation for those who commit this crime.<sup>8</sup>

### *Encouraging Witness Testimony*

Chapters 1097, 1098, 1100 and 1101 provide increased protection for victims<sup>9</sup> and witnesses.<sup>10</sup> Under existing law, if a court finds that a witness is being threatened, it may order the intimidation to cease.<sup>11</sup> Chapter 1097 provides further protection for witnesses by permitting counties to establish facilities for the protection of witnesses and victims who have been threatened because they intend to testify or attend either a trial, proceeding, or inquiry.<sup>12</sup>

Chapter 1101 provides that any person in possession of a deadly weapon<sup>13</sup> with the intent to use the weapon to prevent a victim or witness from attending a trial, giving testimony, making a report, or seeking an arrest will be sentenced to imprisonment in either the county jail for up to one year or in the state prison.<sup>14</sup> Additionally, Chapter 1101 specifies that the punishment for any person who brings into, or possesses within, a courthouse any deadly weapon<sup>15</sup> will be imprisoned in

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B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Government Authority* §816 (1963) (definition of witness).

2. CAL. PENAL CODE §§13826, 13826.6.

3. CAL. GOV'T CODE §25360.

4. See CAL. PENAL CODE §§136.5, 152, 171b, 653(f).

5. *Id.* §1328. See Telephone conversation with Luis Cespedas, Legislative Aide to Assemblyman Torres (June 23, 1982) (notes on file at the *Pacific Law Journal*) [hereinafter referred to as Cespedas].

6. CAL. PENAL CODE §1387.

7. See *id.* §§136.1(d), 1170.15.

8. *Id.* §1203.06 (a)(1)(x).

9. *Id.* §136(3) (definition of victim).

10. CAL. GOV'T CODE §25360; CAL. PENAL CODE §§136.5, 152, 171b, 1328.

11. CAL. PENAL CODE §136.2.

12. CAL. GOV'T CODE §25360.

13. See *People v. Shah*, 91 Cal. App. 2d 722, 724, 205 P.2d 1077, 1079 (1949) (definition of deadly weapon).

14. CAL. PENAL CODE §136.5.

15. *Id.* §171b. Deadly weapons that cannot be brought into the courthouse include: firearms, switchblades, knives with fixed blades more than 4" in length, or any deadly weapon specified in California Penal Code section 12020. *Id.*

either the county jail for up to one year or in the state prison.<sup>16</sup> This provision, however, does not apply to any peace officer,<sup>17</sup> person licensed to carry a concealed firearm,<sup>18</sup> or person transporting a weapon as evidence.<sup>19</sup>

Existing law prohibits threatening any victim or witness prior to giving testimony or prior to trial.<sup>20</sup> Chapter 1100 now offers protection to witnesses *after* a trial by prohibiting willful<sup>21</sup> threats against victims and witnesses, or their property,<sup>22</sup> in retaliation for providing assistance or information to law enforcement officers,<sup>23</sup> or public prosecutors at a criminal or juvenile court proceeding.<sup>24</sup>

Prior law allowed any person to serve a subpoena.<sup>25</sup> This law allowed a defendant to serve a subpoena on persons who witnessed the crime that the defendant allegedly committed.<sup>26</sup> Chapter 1098 eliminates this opportunity for a defendant to intimidate a witness by prohibiting defendants from serving subpoenas on persons who intend to testify at the defendant's trial.<sup>27</sup>

Existing law punishes anyone who was solicited<sup>28</sup> by another to intimidate a witness and does so for compensation.<sup>29</sup> Chapter 1096 also provides punishment for the solicitor by making it unlawful to solicit the use of force or threat of force<sup>30</sup> for the purpose of preventing a witness or potential witness from attending or testifying at any trial, proceeding, or inquiry.<sup>31</sup> The punishment will consist of either imprisonment in the county jail for a period of up to one year or in the state prison; a fine of either \$5,000 or the amount that was offered as payment for the crime, whichever is larger; or both a fine and imprisonment.<sup>32</sup>

Finally, Chapter 1093 provides that community based organiza-

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16. *Id.* §171b.

17. *Id.* §7(8) (definition of peace officer).

18. *Id.* §12050.

19. *Id.* §171b.

20. *Id.* §136.1.

21. *Id.* §7(1) (definition of willfully).

22. *Id.* §7(10) (definition of property).

23. *Id.* §137(e) (definition of law enforcement official).

24. *Id.* §152.

25. CAL. STATS. 1969, c. 311, §2 at 670 (amending CAL. PENAL CODE §1328).

26. *See* Cespedas, *supra* note 5.

27. CAL. PENAL CODE §1328.

28. *See* *People v. Litt*, 221 Cal. App. 2d 543, 548-49, 34 Cal. Rptr. 592, 595-96 (1963); *People v. Rissman*, 154 Cal. App. 2d 265, 275-76, 316 P.2d 60, 69 (1957) (definition of solicitation).

29. CAL. PENAL CODE §137.

30. *Id.* §137(b) (definition of threat of force).

31. *Id.* §653f(a).

32. *Id.*

tions<sup>33</sup> designed to suppress gang violence through supervision, should also encourage witness testimony.<sup>34</sup> Chapter 1093 states that any community organization that is funded by the Gang Violence Suppression Program must inform the public about witness protection services, and cooperate with law enforcement agencies and public prosecutors in order to help witnesses testify.<sup>35</sup>

### *Penalties for Witness Intimidation*

#### *A. Sentencing*

Chapters 1098, 1099, and 1100 provide for enhancement of sentences for those convicted of witness intimidation.<sup>36</sup> Under existing law, any person who induces or attempts to induce by means of force, threats, or bribes<sup>37</sup> any victim, witness, or person with material information to withhold true testimony or give false testimony is guilty of a felony.<sup>38</sup> Furthermore, any person who knowingly<sup>39</sup> and maliciously<sup>40</sup> prevents a witness or victim from attending a trial, giving testimony, making a report, or seeking an arrest is also guilty of a felony when the act is accompanied by force, threats, or other circumstances that increase the severity of the crime.<sup>41</sup> Chapter 1098 provides that the use of force during the commission of either of these offenses will be considered an aggravating circumstance<sup>42</sup> mandating that the court impose the longest term of imprisonment allowed by the statute.<sup>43</sup> If that force used results in great bodily injury,<sup>44</sup> the sentence can be further enhanced<sup>45</sup> with an additional term.<sup>46</sup>

Moreover, when a person feloniously dissuades a witness from giving information pertaining to a felony previously committed by that person, Chapter 1099 provides that the punishment for suppressing the witness' information must be imprisonment for the middle term provided in the statute.<sup>47</sup> Chapter 1099 also permits appropriate addi-

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33. *Id.* §13826.6 (definition of community based organization).

34. *Id.* §13826.6(a)(4).

35. *Id.*

36. *See id.* §§136.1(e), 136.1(f), 1170.15.

37. *Id.* §7(6) (definition of bribe).

38. *Id.* §136.1(c).

39. *Id.* §7(5) (definition of knowingly).

40. *Id.* §7(4) (definition of malice).

41. *Id.* §136.1(c).

42. *Id.* §1170(b).

43. *Id.* §136(f).

44. *Id.* §12022.7 (definition of great bodily injury).

45. *See id.* §§667.5, 12022, 12022.3, 12022.5, 12022.8 (types of enhancement).

46. *Id.* §136.1(e).

47. *Id.* §1170.15; *see id.* §1170(b) (definition of middle term).

tional terms to be imposed if the defendant is armed with a firearm,<sup>48</sup> uses a firearm,<sup>49</sup> or inflicts great bodily injury<sup>50</sup> while intimidating a witness.<sup>51</sup>

Under existing law, neither probation nor sentence suspension can be granted to persons who use a firearm to commit certain particularly serious crimes.<sup>52</sup> Chapter 1100 includes felony witness intimidation<sup>53</sup> among these specified serious crimes.<sup>54</sup>

### *B. Other Penalties*

Under existing law, a court order terminating an action<sup>55</sup> on a felony or on a misdemeanor charged with a felony will bar future prosecution.<sup>56</sup> In order to prevent a defendant from avoiding prosecution by suppressing witness testimony, Chapter 637 provides that an order to cease the proceedings made as the result of the direct intimidation of a material witness will not act as a bar to future prosecutions.<sup>57</sup>

In summary, Chapters 637, 1093, and 1096-1101 appear to provide for the safety and convenience of witnesses while increasing the penalties for persons who seek to prevent their testimony.<sup>58</sup> This legislation hopefully will encourage more witnesses to testify and aid law enforcement agencies in the prosecution of crime.<sup>59</sup>

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48. CAL. PENAL CODE §12022.

49. *Id.* §12022.5.

50. *Id.* §12022.7.

51. *Id.* §1170.15.

52. *Id.* §1203.06 (offenses that probation or sentence suspension would not be granted for include: murder; assault with intent to commit murder; robbery with kidnapping, kidnapping for ransom, extortion, or robbery; first degree burglary; rape of a woman of unsound mind; assault with intent to commit rape; sodomy or robbery; and escape from custody).

53. *Id.* §§136.1(c), 137(b).

54. *Id.* §1203.06(a)(1)(x).

55. *Id.* §§859b (dismissal for failure to provide a speedy preliminary examination), 861 (dismissal for failure to provide a continuous preliminary examination), 871, 995 (dismissal due to lack of sufficient cause to believe that a public offense has been committed).

56. *Id.* §1387.

57. *Id.*

58. See CAL. GOV. CODE §25360; CAL. PENAL CODE §§136.1(e), 136.1(f), 136.5, 152, 171b, 653f(a), 1170.15, 1203.06(a)(1)(x), 1328, 1387.

59. See Assemblyman Art Torres Newsletter, February 19, 1982 (copy on file at the *Pacific Law Journal*).

## **Crimes; prohibition of drug paraphernalia**

Health and Safety Code §§11014.5, 11364.7 (new).

SB 341 (Russell); STATS. 1982, Ch 1278

Support: California Federation of Womens' Clubs; Department of Finance; League of California Cities

Chapter 1278, patterned after the Model Act of the United States Drug Enforcement Agency<sup>1</sup> was enacted to offset the expanded sale of controlled substances by allowing the arrest and prosecution of paraphernalia retailers.<sup>2</sup> Chapter 1278 provides a statutory definition of drug paraphernalia<sup>3</sup> and establishes criteria for courts to consider when determining what constitutes drug paraphernalia.<sup>4</sup> Chapter 1278 mandates criminal penalties for all persons who deliver, furnish, transfer, possess, manufacture with the intent to deliver, furnish, or transfer drug paraphernalia<sup>5</sup> and permits drug paraphernalia to be subject to search and seizure.<sup>6</sup> Chapter 1278 also provides that a business licensed by the state may have its business or liquor license revoked for violations of these provisions.<sup>7</sup>

Chapter 1278 defines drug paraphernalia as all equipment, products, and materials of any kind designed or marketed for use<sup>8</sup> in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.<sup>9</sup> Furthermore, Chapter 1278 declares a nonexhaustive list of items that are to be considered drug paraphernalia.<sup>10</sup> To aid courts and other authorities in determining whether an item is drug paraphernalia, Chapter 1278 provides that any logically relevant factors may be considered including (1) statements by an owner or by anyone in control of the object concerning its use, (2) instructions provided with the object concerning its use, (3) descriptive materials accompanying the object, (4) national or local advertising of the object, (5) the manner of display of the object, or (6) expert testimony concerning the use of the object.<sup>11</sup> In addition, the fact that the owner is a

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1. MODEL DRUG PARAPHERNALIA ACT (United States Department of Justice, Drug Enforcement Agency) (reprinted in *DRUG ENFORCEMENT*, March 1980, at 29) [hereinafter cited as MODEL ACT].

2. See Assemblyman Bill Filante, Press Release, *Filante Calls Passage of Anti-Drug Paraphernalia Bill "A Victory for the People,"* August 25, 1982 (copy on file at *Pacific Law Journal*).

3. CAL. HEALTH & SAFETY CODE §11014.5(a).

4. *Id.* §11014.5(c).

5. *Id.* §11364.7(a).

6. *Id.* §11364.7(d).

7. *Id.* §11364.7(c).

8. See *id.* §11014.5(b) (definition of marketed for use).

9. See *id.* §11014.5(a).

10. Compare *id.* with *id.* §11364.5(d).

11. *Id.* §11014.5(c).

legitimate supplier of like or related items to the community, such as a licensed tobacco dealer, may also be considered in determining whether an object is drug paraphernalia.<sup>12</sup>

Under existing law, a *fine* will be imposed on any person who possesses an opium pipe or any device or drug paraphernalia used for unlawfully injecting or smoking a controlled substance.<sup>13</sup> Existing law also makes it a misdemeanor to knowingly<sup>14</sup> supply minors with drug paraphernalia or any instrument designed for smoking or injecting a controlled substance.<sup>15</sup> Chapter 1278 now provides that it is a misdemeanor to (1) deliver, furnish, or transfer drug paraphernalia to any person,<sup>16</sup> or (2) to possess or manufacture with the intent to deliver, furnish, or transfer those items to any person.<sup>17</sup> Chapter 1278 further states that to be convicted under these provisions the person must have known, or reasonably should have known that the paraphernalia would be used with a controlled substance.<sup>18</sup>

Chapter 1278 also provides that persons who are 18 years of age or older and violate these provisions by delivering, furnishing, or transferring paraphernalia to a minor at least three years their junior may be punished by a fine of not more than \$1000 or by imprisonment of not more than one year, or both fine and imprisonment.<sup>19</sup> In addition, Chapter 1278 provides that if the holder of a business or liquor license issued by a public entity violates any of these provisions, that violation will be grounds for revocation of the license.<sup>20</sup> Moreover, Chapter 1278 specifies that all drug paraphernalia covered by these provisions will be subject to forfeiture and seizure by any peace officer.<sup>21</sup> Chapter 1278 further states that it is the intent of the Legislature that if any provision of this section is held invalid, the other provisions that can be given effect will be severed from the invalid provisions.<sup>22</sup>

### COMMENT

The Model Drug Paraphernalia Act<sup>23</sup> [hereinafter referred to as

12. *Id.*

13. *Id.* §11364. *See id.* §11007 (definition of controlled substances).

14. CAL. PENAL CODE §7 (definition of knowingly).

15. Compare *id.* §308 with CAL. HEALTH & SAFETY CODE §11364.7(a). *See generally* CAL. HEALTH & SAFETY CODE §11364.5 (fines for businesses who display drug paraphernalia to minors).

16. CAL. HEALTH & SAFETY CODE §11364.7(a).

17. *Id.*

18. *Id.*

19. *Id.* §11364.7(b).

20. *Id.* §11364.7(c).

21. *Id.* §11364.7(d).

22. *Id.* §§11014.5(d), 11364.7(e).

23. MODEL ACT, *supra* note 1.



MDPA], enacted in 1979 by the Drug Enforcement Agency, was an attempt to provide the states with guidelines to enact drug paraphernalia statutes and cure the previous constitutional infirmities of earlier statutes.<sup>24</sup> The California Legislature has expressly patterned Chapter 1278 after the MDPA.<sup>25</sup> Similar statutes in other states that have followed the MDPA, however, have not eluded federal or state constitutional attack.<sup>26</sup> Certain provisions of these similar statutes have been challenged, including the drug paraphernalia definition,<sup>27</sup> the constructive intent requirement,<sup>28</sup> and the list of relevant factors<sup>29</sup> for violating due process requirements<sup>30</sup> because they were too vague and overbroad.<sup>31</sup> Also, the statutory provisions regarding search and seizure<sup>32</sup> of drug paraphernalia have been attacked for violating the fourth amendment of the United States Constitution.<sup>33</sup> Moreover, first amendment violations<sup>34</sup> have been raised to the restrictions on retailer advertising<sup>35</sup> as well as equal protection<sup>36</sup> arguments for arbitrary and discriminatory classifications.<sup>37</sup> In *Record Revolution, No. 6, Inc. v. City of Parma*,<sup>38</sup> the constitutionality of a similar drug paraphernalia statute

24. See generally Johnson, *The Constitutionality of Drug Paraphernalia Laws*, 81 COLUM. L. REV. 581 (1981).

Because prior statutes were either too vaguely worded to survive constitutional attack or too limited in scope to permit comprehensive regulation of the multi-faceted paraphernalia industry, the Model Act attempts to balance two somewhat contradictory objectives—precision of statutory language and broad flexible coverage.

*Id.* at 584.

25. Compare MODEL ACT, *supra* note 1 with CAL. HEALTH & SAFETY CODE §§11014.5, 11364.7.

26. Compare *Record Revolution No. 6 v. City of Parma*, 638 F.2d 916, 936 (6th Cir. 1980), *vacated and remanded on other grounds*, 101 S. Ct. 2998 (1981) (declaring drug paraphernalia statute invalid) with *Casbah, Inc. v. Throne*, 651 F.2d 551, 557 (8th Cir. 1980), *cert. denied*, no. 81-415, 50 U.S.L.W. 3713 (U.S. Mar. 9, 1981) (upholding drug paraphernalia statute). See generally, Rupp, *Casbah, Inc. v. Throne: The Nebraska Drug Paraphernalia Act*, 15 CREIGHTON L. REV. 893 (1982).

27. See MODEL ACT, *supra* note 1, §1; CAL. HEALTH & SAFETY CODE §11014.5(a).

28. See MODEL ACT, *supra* note 1, §2; CAL. HEALTH & SAFETY CODE §§11014.5(b), 11364.7(a) ("knowing or under circumstances where one reasonably would know"). *Id.*

29. See MODEL ACT, *supra* note 1, §3; CAL. HEALTH & SAFETY CODE §11014.5(c).

30. See U.S. CONST. amend. XIV, §1. See generally Johnson, *The Constitutionality of Drug Paraphernalia Laws*, 81 COLUM. L. REV. 581, 587 (1981).

31. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972). "Vague laws trap the innocent by not providing fair warning and fail to provide explicit standards for law enforcement officers, leading to arbitrary and discriminatory law enforcement." *Id.* at 108.

32. See *Geiger v. City of Eagan*, 618 F.2d 26, 29 (8th Cir. 1980); 651 F.2d at 561-62; MODEL ACT, *supra* note 1; CAL. HEALTH & SAFETY CODE §11364.7(d). See generally Rupp, *Casbah, Inc. v. Throne: The Nebraska Drug Paraphernalia Act*, 15 CREIGHTON L. REV. 893, 898 (1982) (delineating the search and seizure challenges to statutes similar to the MDPA).

33. U.S. CONST. amend. IV.

34. U.S. CONST. amend. I.

35. MODEL ACT, *supra* note 1, art. II, §D, CAL. HEALTH & SAFETY CODE §11014.5(b); see 651 F.2d at 563; 638 F.2d at 937.

36. U.S. CONST. amend. XIV, §1.

37. See *Music Plus Four, Inc. v. Barnett*, 114 Cal. App. 3d 113, 132, 170 Cal. Rptr. 419, 431 (1981).

38. 638 F.2d 916 (1980).

in Ohio was called into question and the Sixth Circuit Court of Appeals declared the statute constitutionally infirm.<sup>39</sup> Conversely, in *Casbah, Inc. v. Thone*,<sup>40</sup> the Eighth Circuit Court of Appeals held, on almost identical facts, that a Nebraska statute did not violate any constitutional provisions.<sup>41</sup> Furthermore, on the state level, a municipal drug paraphernalia statute was upheld by a California appeals court in *Music Plus Four, Inc. v. Barnett*.<sup>42</sup> Since Chapter 1278 closely parallels the MDPA,<sup>43</sup> it is conceivable that the same constitutional contentions will be raised against it.

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39. *Id.* at 936.

40. 651 F.2d 551 (1980).

41. *Id.* at 557.

42. 114 Cal. App. 3d 113, 170 Cal. Rptr. 419 (1981); *see also* *Music Plus Four, Inc. v. City of Los Angeles*, 125 Cal. App. 3d 829, 178 Cal. Rptr. 296 (1981).

43. *See supra* note 3.

## Crimes; enhancement—for felonies committed while on bail

Penal Code §12022.1 (new); §1170.1 (amended).

AB 692 (McAllister); STATS. 1982, Ch 1551

Support: Attorney General; California District Attorneys Association; Department of Corrections; Department of Finance

Opposition: American Civil Liberties Union; Friends Committee on Legislation

Existing law permits the enhancement of prison sentences upon conviction of a subsequent felony under specified circumstances<sup>1</sup> and provides formulas to aid in the determination of the enhancement.<sup>2</sup> Chapter 1551 provides for enhancement when persons are convicted of a felony committed while they were released from custody on bail or on their own recognizance pending trial on an earlier felony offense.<sup>3</sup>

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1. *See* CAL. PENAL CODE §1170.1(a). *See generally id.* §§12022(a) (imposes a one year enhancement for committing a felony while armed with a firearm); 12022(b) (imposes a one year enhancement for using a deadly weapon in the commission of a felony unless the use was an element of the offense); 12022.3 (imposes a three year enhancement for the use of a deadly weapon and a two year enhancement for the possession of a deadly weapon in the commission of certain sex offenses); 12022.5 (imposes a two year enhancement for personal use of a firearm in the commission of a felony unless the use was an element of the offense); 12022.6 (imposes either a one or two year enhancement if valuable property is taken, damaged or destroyed in the commission of a felony); 12022.7 (imposes a three year enhancement if great bodily injury is inflicted during the commission of a felony); 12022.8 (imposes a five year enhancement if great bodily injury is inflicted during the commission of certain sex offenses).

2. *See id.* §1170.1(a).

3. *See id.* §12022.1.

In this situation, Chapter 1551 states that an enhancement of two years will be added to the sentence imposed for the felony committed while out on bail if the convicted person has been previously sentenced to state prison for the earlier felony.<sup>4</sup> Additionally, Chapter 1551 provides that any state prison sentence for the latter offense must be imposed consecutively to the earlier sentence.<sup>5</sup> Even if probation was granted for the earlier offense, the prison sentence for the subsequent felony will still be enhanced by the additional two year term.<sup>6</sup> Moreover, if the conviction for the first offense is reversed on appeal, Chapter 1551 requires that the enhancement be suspended pending the resolution of the appeal.<sup>7</sup> If the conviction is reimposed after retrial, the enhancement will be reinstated.<sup>8</sup> Even if the person is no longer in custody for the subsequent offense the court *may* order the person to be recommitted to custody to serve out the enhancement.<sup>9</sup> Chapter 1551 further amends provisions of existing law to correspond with the newly created enhancements.<sup>10</sup>

Under existing law, the aggregate term of imprisonment that may be imposed upon conviction of two or more felonies is the sum of the principal term,<sup>11</sup> the subordinate term,<sup>12</sup> and any additional enhancements imposed pursuant to specified provisions of law.<sup>13</sup> The total of all subordinate terms for nonviolent felonies may not exceed five years, and the aggregate term of imprisonment is limited to twice that of the principal term.<sup>14</sup>

When a consecutive term of imprisonment is imposed in accordance with statutory provisions<sup>15</sup> for two or more convictions of kidnapping<sup>16</sup> involving *both* separate *victims* and separate *occasions*,<sup>17</sup> Chapter 1551 requires the aggregate term of imprisonment to be the sum of the principal term, the subordinate term, and *one-third* of enhancements imposed pursuant to specified provisions of law.<sup>18</sup> The subordinate term

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4. *Id.* §12022.1(a).

5. *Id.*

6. *Id.* §12022.1(b).

7. *Id.* §12022.1(c).

8. *Id.*

9. *Id.*

10. Compare *id.* §§1170.1(a), (e) with CAL. STATS. 1980, c. 1117, §8 at 3597-98 (amending CAL. PENAL CODE §1170.1).

11. See CAL. PENAL CODE §1170(a)(2) (definition of principal term).

12. See *id.* §1170.1(a) (definition of subordinate term).

13. *Id.* See generally *id.* §§667.5, 667.6, 12022.1 (situations where additional terms are imposed).

14. *Id.* §1170.1(a).

15. See generally *id.* §§669, 1170 (provisions for imposing consecutive terms).

16. *Id.* §207 (definition of kidnapping).

17. See *id.* §1170.1(b).

18. *Id.* See generally *id.* §§12022, 12022.5, 12022.7 (statutory enhancement provisions).

is usually defined as one-third of the middle term<sup>19</sup> but under Chapter 1551, the subordinate term is defined as the total middle term for each kidnapping conviction when a consecutive term of imprisonment is imposed.<sup>20</sup> The five-year limitation is removed by Chapter 1551 from subordinate terms imposed for second and subsequent convictions of kidnapping involving separate victims and separate occasions.<sup>21</sup>

19. See generally *id.* §1170(b) (when statutes specify three possible terms of imprisonment for an offense, the court will impose the middle term in the absence of aggravating or mitigating circumstances).

20. *Id.* §1170.1(b).

21. Compare *id.* with CAL. STATS. 1980, c. 1117, §8, at 3597 (amending CAL. PENAL CODE §1170.1).

## Crimes; sexual battery—definitions

Penal Code §§243.4, 261.6 (new); §§264.1, 288a, 289 (amended).

AB 2721 (McCarthy); STATS. 1982, Ch 1111

Support: Attorney General; California District Attorneys Association; Women Lawyers of Sacramento; Yolo County Sexual Assault Center

Chapter 1111 provides a definition of consent to be used in prosecutions of specified sex crimes.<sup>1</sup> Additionally, Chapter 1111 amends existing laws relating to the crimes of rape, oral copulation, and penetration of genital or anal openings with a foreign object,<sup>2</sup> and creates the crime of sexual battery.<sup>3</sup>

In *People v. Mayberry*,<sup>4</sup> the California Supreme Court held that a defendant does not possess the wrongful intent needed to be convicted of rape if he entertained a reasonable and bona fide belief that the victim consented to the sexual intercourse.<sup>5</sup> In apparent response to this holding, Chapter 1111 provides that when consent is an issue in prosecutions for certain sex crimes,<sup>6</sup> consent be defined as positive cooperation in act or attitude pursuant to an exercise of free will.<sup>7</sup> To consent, under Chapter 1111, the person must act freely and voluntarily with

1. CAL. PENAL CODE §261.6.

2. Compare CAL. PENAL CODE §§264.1, 288a, 289 with CAL. STATS. 1978, c. 579, §15, at 1983 (amending CAL. PENAL CODE §264.1) and CAL. STATS. 1981, c. 896, §§2, 3, at — (amending CAL. PENAL CODE §§288a, 289).

3. See CAL. PENAL CODE §243.4.

4. 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975).

5. *Id.* at 155, 542 P.2d at 1345, 125 Cal. Rptr. at 753.

6. CAL. PENAL CODE §261.6 (the crimes are rape, sodomy, oral copulation, and penetration of a vaginal or anal opening with a foreign object).

7. *Id.*

knowledge of the true nature of the act or transaction involved.<sup>8</sup>

Chapter 1111 creates and defines the crime of sexual battery as the touching<sup>9</sup> of an intimate part<sup>10</sup> of the body of an unlawfully restrained person, against that person's will, for the purpose of sexual arousal, gratification, or abuse.<sup>11</sup> Sexual battery, however, does not include the crime of rape or penetration of the genital or anal openings by any foreign object, substance, instrument or device.<sup>12</sup> Chapter 1111 provides that a person convicted of a sexual battery will be sentenced to imprisonment in the county jail for not more than one year, or in the state prison for two, three, or four years.<sup>13</sup>

Under existing law, the penetration of the genital or anal openings of another person against the person's will by means of force, violence, or fear with any foreign object, substance, instrument, or device for an illicit purpose is punishable by a state prison term of three, six, or eight years.<sup>14</sup> Chapter 1111 expands the scope of this law by providing that a foreign object additionally includes any part of the body except a sexual organ.<sup>15</sup>

Under existing law, when a defendant, acting in concert with another, either personally or by aiding and abetting, by force or violence and against the will of the victim, commits rape,<sup>16</sup> the defendant is subject to imprisonment in the state prison for five, seven, or nine years.<sup>17</sup> Chapter 1111 amends this provision by allowing the same penalties for *both* rape *and* the act of penetrating the genital or anal openings of another with a foreign object against the victim's will.<sup>18</sup>

Under prior law, oral copulation was the act of copulating the mouth of one person with the sexual organ of another person.<sup>19</sup> Chapter 1111 expands the definition of oral copulation by including the act of copu-

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8. *Id.* See generally, Telephone conversation with Mimi Budd, Legislative Aide to Assemblyman McCarthy (Sept. 30, 1982) (copy on file at *Pacific Law Journal*); 1 CALIFORNIA JURY INSTRUCTIONS CRIMINAL, CALJIC 1.23 (4th Rev. ed. 1979).

9. Touching means the physical contact with the skin of another person. CAL. PENAL CODE §243.4.

10. Intimate part means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* §289(a).

15. Compare *id.* §289(c) with CAL. STATS. 1981, c. 896, §3, at — (amending CAL. PENAL CODE §289).

16. CAL. PENAL CODE §261.

17. *Id.* §264.1.

18. Compare *id.* §264.1 with CAL. STATS. 1978, c. 579, §15, at 1983 (amending CAL. PENAL CODE §264.1).

19. CAL. STATS. 1981, c. 896, §2, at — (amending CAL. PENAL CODE §288a).

lating the mouth of one person with the anus of another.<sup>20</sup>

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20. Compare CAL. PENAL CODE §288a with CAL. STATS. 1981, ch 896, §2, at —.

## Crimes; spousal rape, indecent exposure, child molestation

Penal Code §§262, 314, 647a (amended).

AB 3458 (Levine); STATS. 1982, Ch 1113

Support: California District Attorneys Association; California Peace Officers Association; Department of Corrections; National Organization for Women

In 1981 the California Legislature broadened the definition of rape<sup>1</sup> by declaring that a rape occurs when a person who is not the spouse of the rapist is forced to have sexual intercourse through the use of a threat to retaliate<sup>2</sup> against the victim or another person when there is a reasonable possibility that the rapist will execute the threat.<sup>3</sup> In apparent response to growing public concern over marital violence,<sup>4</sup> Chapter 1113 further extends this definition of rape to include situations in which the perpetrator is the spouse of the victim.<sup>5</sup>

In addition, Chapter 1113 increases the penalties for certain sex crimes when perpetrators accomplish their acts after entering inhabited premises without consent.<sup>6</sup> Under existing law, persons who willfully and lewdly expose themselves in any place where there are other persons present is guilty of a misdemeanor.<sup>7</sup> Chapter 1113 now provides that persons who enter an inhabited dwelling house, trailer coach,<sup>8</sup> or the inhabited portion of any other building without consent and willfully and lewdly expose their bodies to other persons will be punished by imprisonment in either the county jail for not more than one year or in the state prison.<sup>9</sup>

Under existing law, annoying or molesting a child under the age of 18 is punishable by a fine not exceeding \$500, or by imprisonment in

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1. See 13 PAC. L. J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 643 (1982).

2. "Threaten to retaliate" is specifically defined as a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death. CAL. PENAL CODE §261.

3. *Id.*

4. See 11 PAC. L. J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 410 (1980).

5. CAL. PENAL CODE §262.

6. *Id.* §§314, 647a.

7. *Id.* §314.

8. CAL. VEH. CODE §635 (definition of trailer coach).

9. Compare CAL. PENAL CODE §314 with CAL. STATS. 1976, c. 1139, §182 at 5112 (amending CAL. PENAL CODE §314).

the county jail not to exceed six months, or by both fine and imprisonment.<sup>10</sup> Chapter 1113 now provides that every person who violates this provision after entering an inhabited dwelling house, trailer coach, or the inhabited portion of any other building, without consent, will be punished by imprisonment in either the county jail for not more than one year or in the state prison.<sup>11</sup>

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10. CAL. PENAL CODE §647a.

11. Compare *id.* with CAL. STATS. 1976, c. 1139, §262, at 5136 (amending CAL. PENAL CODE §647a).

## Crimes; increased penalties for pimping and pandering

Penal Code §§266h, 266i (amended).

SB 1698 (Roberti); STATS. 1982, Ch 1119

Support: Los Angeles County

Opposition: Department of Corrections

Chapter 1119 was enacted to further deter the crimes of pimping<sup>1</sup> and pandering.<sup>2</sup> Prior to the enactment of Chapter 1119, the penalty for pimping and pandering was imprisonment for two, three or four years in the state prison.<sup>3</sup> In addition, prior law provided a heightened penalty of imprisonment for three, six or eight years for pimping and pandering when the person engaged in prostitution was under 14 years of age.<sup>4</sup> Chapter 1119 now provides that the penalty for pimping and pandering is imprisonment for three, four or six years in the state prison.<sup>5</sup> Chapter 1119 additionally provides that the heightened penalty for pimping and pandering will apply if the person engaged in prostitution is under 16 years of age.<sup>6</sup>

Under existing law, the court can grant probation in any case *except* when that authority is specifically withheld.<sup>7</sup> Chapter 1119 now specifically prohibits the granting of probation to individuals convicted of pimping or pandering unless the person is required to serve a term of imprisonment in the state prison for three years as a condition of

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1. CAL. PENAL CODE §266h (definition of pimping).

2. See *id.* §266i (definition of pandering); Senator David Roberti, Press Release, September 1, 1982 (copy on file at the *Pacific Law Journal*).

3. CAL. STATS. 1981, c. 1043, §§1, 2, at 151, 152.

4. *Id.* See generally 13 PAC. L. J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 640 (1982).

5. CAL. PENAL CODE §§266h, 266i.

6. *Id.*

7. See CAL. PENAL CODE §1203. See generally *id.* §§1203(e), 1203.06, 1203.065, 1203.066, 1203.07, 1203.075, 1203.08, 1203.085, 1203.09.

probation.<sup>8</sup>

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8. *Id.* §§266h, 266i.

## Crimes; punishment for receiving stolen property

Penal Code §496 (amended).

SB 133 (Presley); STATS. 1982, Ch 935

Support: Attorney General; California District Attorneys Association; California Peace Officers Association; Department of Corrections

Opposition: American Civil Liberties Union; California Public Defenders Association

The California Supreme Court has held that a person may not be convicted of receiving stolen property<sup>1</sup> if, in the interval between the theft of property and its receipt by the defendant the property is recovered by the police, because recovery of the stolen property causes the property to lose its stolen status.<sup>2</sup> The defendant, however, could still be convicted of an *attempt* to receive stolen property, because the status of the property does not destroy the criminality of the attempt.<sup>3</sup> Chapter 935 eliminates the necessity for inquiry into the status of the property, if the evidence shows that the defendant had the specific intent<sup>4</sup> to receive stolen property, by punishing the substantive crime and its attempt with the same penalty.<sup>5</sup>

Under existing law, every person who knowingly buys, receives, conceals, sells, withholds, or aids in withholding any property that has been stolen or obtained in any manner constituting theft<sup>6</sup> or extortion,<sup>7</sup> is punished by imprisonment in a county jail for a period of not more than one year, or in the state prison.<sup>8</sup> Under existing law, any knowing *attempt* to buy, receive, conceal, sell, withhold or aid in withholding, selling, or concealing any property that has been stolen or obtained in

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1. See CAL. PENAL CODE §496(1) (definition of the crime of receiving stolen property).

2. See *People v. Rojas*, 55 Cal. 2d 252, 258, 358 P.2d 921, 925, 10 Cal. Rptr. 465, 469 (1961); see also 1 B. WITKIN, CALIFORNIA CRIMES §103 (Supp. 1978).

3. See 55 Cal. 2d at 258, 358 P.2d at 924, 10 Cal. Rptr. at 468.

4. See *People v. Thomas*, 25 Cal. 2d 880, 898, 156 P.2d 7, 17 (1945) (definition of specific intent).

5. See Telephone interview with Barbara Hadley, Legislative Secretary to Senator Robert Presley (June 29, 1982) (notes on file at the *Pacific Law Journal*). Compare CAL. PENAL CODE §496(1) with *id.* §496(5).

6. CAL. PENAL CODE §484(a) (definition of theft).

7. *Id.* §518 (definition of extortion).

8. See *id.* §496(1).



any manner constituting theft or extortion is punishable by one-half the term of imprisonment applicable to the commission of the offense itself.<sup>9</sup> Chapter 935 now imposes a term of imprisonment in the county jail for up to one year, or in the state prison, on any person convicted of an attempt to receive stolen property, except when the offense is specified in the accusatory pleading as a misdemeanor.<sup>10</sup>

Furthermore, to reduce a charge of receiving stolen property to a misdemeanor in the accusatory pleading, prior law required the district attorney or grand jury to determine that the reduction would be in the best interests of justice and that the value of the illegally obtained property did not exceed \$200.<sup>11</sup> Chapter 935 broadens the ability to reduce the offense to a misdemeanor for both the substantive crime and its attempt by providing that the charge may be reduced if it is determined that it is in the best interests of justice and the value of the property stolen does not exceed \$400.<sup>12</sup> Chapter 935 specifically states that none of these monetary provisions will be given retroactive effect.<sup>13</sup>

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9. See *id.* §664 (punishments for attempts of crimes when no specific provisions are provided for in other sections).

10. See *id.* §496(5).

11. CAL. STATS. 1980, c. 1163, §4, at 3914-15 (amending CAL. PENAL CODE §496).

12. Compare CAL. PENAL CODE §496(1) with CAL. STATS. 1980, c. 1163, §4, at 3914-15.

13. CAL. STATS. 1982, c. 935, §2, at —.

## Crimes; calculation of sentence—residential burglaries

Penal Code §1170.8 (new).

AB 501 (Wright); STATS. 1982, Ch 1296

Support: Attorney General; California Peace Officers Association;

Department of Corrections; Department of Finance

Opposition: California Attorneys for Criminal Justice; State Public Defender

The aggregate term of imprisonment that may be imposed under existing law when any person is convicted of two or more felonies is defined as the sum of the principal term,<sup>1</sup> the subordinate term,<sup>2</sup> and any additional enhancements imposed pursuant to specified provisions of law.<sup>3</sup> If the offenses committed by the defendant were not "violent

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1. CAL. PENAL CODE §1170.1(a); see *id.* §1170(2) (definition of principal term). The phrases "principal term" and "base term" are synonymous and used interchangeably. *Id.*

2. See *id.* §1170.1(a) (definition of subordinate term).

3. *Id.* See generally *id.* §§667.5 (imposes an additional three year term for each prior prison term served after conviction of a "violent felony"; imposes an additional one-year term for each

felonies,"<sup>4</sup> the subordinate term for each consecutive offense is defined as one-third of the middle term<sup>5</sup> of imprisonment applicable to that offense, excluding any enhancements.<sup>6</sup>

Under existing law, the total of all subordinate terms for nonviolent felonies may not exceed five years.<sup>7</sup> Chapter 1296 creates an exception to the limit imposed on subordinate terms by providing that the term imposed may exceed 5 years but may not exceed ten years when the consecutive offenses are residential burglaries.<sup>8</sup>

Existing law provides that the aggregate term of imprisonment will not exceed twice that of the principal term<sup>9</sup> unless the defendant has been convicted of a violent felony, a felony escape<sup>10</sup> or a felony committed while confined in state prison<sup>11</sup> or is subject to specified enhancements.<sup>12</sup> Chapter 1296 creates an additional exception to this limitation by providing that the term of imprisonment *may* exceed twice the principal term if the defendant is convicted of at least two residential burglaries.<sup>13</sup> In addition, Chapter 1296 defines residential burglary as burglary in the nighttime, or felony burglary<sup>14</sup> in the daytime, of an inhabited<sup>15</sup> dwelling house<sup>16</sup> or trailer coach<sup>17</sup> or the inhabited portion of any other building,<sup>18</sup> in accord with existing law.<sup>19</sup>

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prior prison term served after conviction of any felony), 667.6 (imposes an additional five-year term for each prior conviction of specified sex offenses; imposes an additional ten-year term on persons who have served two or more prior prison terms after conviction of specified sex offenses).

4. *See id.* §667.5(c) (definition of violent felony).

5. *See generally id.* §1170(b) (when statutes specify three possible terms of imprisonment for an offense, the court will impose the middle term in the absence of aggravating or mitigating circumstances.)

6. *Id.* §1170.1(a).

7. *Id.*

8. *See id.* §1170.8(a). Residential burglary committed during the daytime is classified to be first degree burglary; CAL. STATS. 1982, c. 1296, §1, at — (amending CAL. PENAL CODE §460).

9. *See id.* §1170.1(a).

10. *See id.* §4530 (definition of felony escape).

11. *Id.* §1170.1(f).

12. *Id.* *See generally* §§12022, 12022.5, 12022.6, 12022.7 (enhancements where the limitation does not apply).

13. *See id.* §1170.8(b).

14. *See Id.* §460(a), (b) (definition of felony burglary). Felony burglary has been redefined to include burglaries committed in the nighttime of an inhabited recreational vehicle. *See* CAL. STATS. 1982, c. 1296, §1, at — (amending CAL. PENAL CODE §460(a)).

15. *See* CAL. PENAL CODE §459 (definition of inhabited).

16. *See id.* (definition of dwelling house).

17. CAL. VEH. CODE §635 (definition of trailer coach).

18. CAL. PENAL CODE §1170.8(c).

19. CAL. STATS. 1980, c. 42, §1, at 106 (adding CAL. PENAL CODE §462).

## Crimes; violation of injunctive orders

Code of Civil Procedure §527.6 (amended); Penal Code §273.6 (amended).

AB 2174 (Levine); STATS. 1982, Ch 423

Support: Attorney General; California Peace Officers Association; Department of Finance

Existing law provides that a person who has experienced harassment<sup>1</sup> from another may seek a temporary restraining order<sup>2</sup> (hereinafter referred to as TRO) and an injunction.<sup>3</sup> Anyone who willfully<sup>4</sup> violates a TRO or an injunction<sup>5</sup> issued to prohibit harassment of another is guilty of contempt,<sup>6</sup> and is subject to imprisonment in the county jail for a maximum of six months, a fine of not more than \$500, or both.<sup>7</sup> Prior to the enactment of Chapter 423, a person guilty of a second or subsequent violation was subject to the same penalties.<sup>8</sup> In the apparent effort to deter individuals from committing repeated acts of harassment in willful violation of a court order,<sup>9</sup> Chapter 423 increases the maximum period of incarceration to one year for violators who have been previously convicted for violating a court order.<sup>10</sup> Subject to the discretion of the court, Chapter 423 expressly authorizes the prosecution to present witnesses and relevant evidence at the defendant's sentencing hearing.<sup>11</sup>

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1. See CAL. CIV. PROC. CODE §527.6(b) (defines harassment as a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys or harasses the person, and which serves no legitimate purpose).

2. See generally *id.* §528 (providing for the temporary restraint of the defendant pending issuance of the injunction).

3. *Id.* §527.6(a). See generally *id.* §525 (definition of injunction).

4. See generally CAL. PENAL CODE §7 (definition of willfully).

5. See generally CAL. CIV. PROC. CODE §527.6(c) (requirements for the issuance of a temporary restraining order and an injunction).

6. See generally *id.* §1209 (definition of contempt); *Berger v. Superior Court of Sacramento*, 175 Cal. 719, 167 P. 143 (1917) (providing that contempt of court occurs upon the violation of an injunctive order).

7. CAL. PENAL CODE §273.6(a)(1).

8. See CAL. STATS. 1981, c. 182, §5, at — (amending CAL. PENAL CODE §273.6).

9. See Telephone conversation with John Rueda, Legislative Assistant to Assemblyman Levine (August 5, 1982) (notes on file at the *Pacific Law Journal*).

10. CAL. PENAL CODE §273.6(b).

11. *Id.*; see also *id.* §1204 (authorizes the prosecution to introduce evidence of circumstances in aggravation of the sentence). See generally *People v. Williams*, 14 Cal. 2d 532, 95 P. 2d 456 (1939) (providing that the court may consider moral character, circumstances attending the offense, and any other evidence it may deem necessary in determining the sentence to be imposed).

## Crimes; peace officer-secondary employment, violence against

Penal Code §§70, 243 (amended).

AB 253 (Alatorre); STATS. 1982, Ch 1300

Support: California Peace Officers Association; California State Employees Association; Peace Officers Research Association of California

Opposition: Licensed Private Investigators

AB 3276 (Wright); STATS. 1982, Ch 1353

Support: Attorney General; California Peace Officers Association; Department of Corrections; Department of Finance

Chapter 1300 permits off-duty peace officers,<sup>1</sup> while employed by a public entity<sup>2</sup> as private security guards,<sup>3</sup> to retain certain privileges<sup>4</sup> afforded them in their public employment.<sup>5</sup> Additionally, Chapter 1353 provides enhanced criminal penalties for batteries committed against peace officers within the scope of their part-time employment.<sup>6</sup>

Prior to Chapter 1300, legislation<sup>7</sup> had specifically authorized peace officers to work off-duty in their uniform with approval from the officer's public employer, but it did not outline the exact powers that peace officers would retain in their off-duty employment.<sup>8</sup> Prior to the enactment of Chapter 1300, case law had interpreted these duties of off-duty peace officers as *private* duties when performed within the scope of their off-duty employment as private security guards.<sup>9</sup> Recently, the California Supreme Court, in *Cervantez v. J.C. Penney Co.*,<sup>10</sup> held that

1. See CAL. PENAL CODE §§830.1-8, 831 (definition of peace officer); CAL. GOV'T CODE §50920.

2. CAL. EVID. CODE §200 (definition of public entity).

3. See generally CAL. BUS. & PROF. CODE §§7512-7590 (Private Investigator and Adjusters Act).

4. See *id.* §4052.2, 4035.2; CAL. PENAL CODE §§243, 245, 836, 11105, 12025, 12031; CAL. GOV'T CODE §§3201, 50921; CAL. LAB. CODE §4800 (powers of on-duty public patrolman). See generally CAL. BUS. & PROF. CODE §§7512-7590 (powers of private investigators and security officers).

5. Compare CAL. PENAL CODE §70 with CAL. STATS. 1975, c. 1164, §1, at 2882 (amending CAL. PENAL CODE §70).

6. Compare CAL. PENAL CODE §243 with CAL. STATS. 1981, c. 678, §2, at 2199 (amending CAL. PENAL CODE §243).

7. CAL. BUS. & PROF. CODE §7522. Since 1979 off-duty police officer can take private employment if the secondary employment does not conflict with the interests of the primary employment. *Id.* See generally *id.* §7522(b), CAL. GOV'T CODE §1126(a).

8. Compare CAL. BUS. & PROF. CODE §7522(2) with CAL. PENAL CODE §70.

9. See *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 588, 595 P.2d 975, 980, 156 Cal. Rptr. 198, 203 (1979); *People v. Corey*, 21 Cal. 3d 738, 746, 581 P.2d 644, 649, 147 Cal. Rptr. 639, 644 (1978).

10. 24 Cal. 3d 579, 595 P.2d 975, 156 Cal. Rptr. 198 (1979).

an off-duty police officer employed as a security guard did not retain the arrest powers of a public peace officer.<sup>11</sup>

Chapter 1300 now clarifies the actual powers retained by these off-duty peace officers<sup>12</sup> by expressly providing that peace officers may, while employed part-time by a public entity, exercise their peace officer status *concurrently*<sup>13</sup> with their off-duty employment, subject to the reasonable regulations of the primary employer and the Private Investigators and Adjusters Act.<sup>14</sup> To accomplish this, Chapter 1300 eliminates the judicial construction of this provision by expressly abrogating the decision in *Cervantez* and reinstating prior court interpretation<sup>15</sup> that *presumably* granted off-duty peace officers the expanded powers that peace officers are furnished in their primary employment.<sup>16</sup> Additionally, Chapter 1300 alleviates all criminal and civil liability in the primary employer and stipulates that all potential liability will be borne solely by the secondary employer.<sup>17</sup>

Existing law provides for enhanced penalties for batteries<sup>18</sup> knowingly<sup>19</sup> committed against on-duty peace officers, custodial officers,<sup>20</sup>

11. *Id.* at 588, 595 P.2d at 980, 156 Cal. Rptr. at 203 (1979); see CAL. PENAL CODE §839 (arrest powers of public peace officer).

12. See CAL. PENAL CODE §70.

13. See *id.* See generally *People v. Zelinski*, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979) (involving the exclusion of evidence obtained by private security guards); SCOPE OF LEGAL AUTHORITY OF PRIVATE SECURITY PERSONNEL, prepared by the Private Security Advisory Council to the Law Enforcement Assistance Administration: U.S. Department of Justice (1976).

Chapter 1300 would create a double standard by providing off-duty police officers employed as security guards with a public entity with greater arrest powers, greater protection against assaults and batteries, and wider discretion in the detainment of suspected persons than their purely private counterparts. Since full-time security guards would possess only the arrest powers of a citizen, off-duty peace officers would become a valuable commodity to other public entities. See A. BIKLE, J. KLOTTER, R. FEDERAL, LEGAL ASPECTS OF PRIVATE SECURITY §2.5 (1981).

14. CAL. PENAL CODE §70. See CAL. BUS. & PROF. CODE §§7522(1), (m).

15. See CAL. PENAL CODE §70. See generally *People v. Millard*, 15 Cal. App. 3d 759, 93 Cal. Rptr. 402 (1971); *Dowdell v. Owl Drug Co.*, 121 Cal. App. 316, 8 P.2d 890 (1932). There is some debate as to the exact status of the law before *Cervantez*. See generally 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against the Person* §255 (Supp. 1978). The amendments represent adherence to the principle that a duly commissioned police officer holds a public office on a continuing basis and secondary employment as a security guard does not nullify the police officers sworn obligation to preserve the peace. See A. BIKLE, J. KLOTTER, R. FEDERAL, LEGAL ASPECTS OF PRIVATE SECURITY §2.5 (1981); NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE PRIVATE SECURITY, REPORT OF TASK FORCE ON PRIVATE SECURITY, §§6.7, 6.8 (1976).

16. CAL. PENAL CODE §70. This provision provides that any public employee who knowingly receives any gratuity, award, or promise in exchange for an official act is guilty of a misdemeanor. Chapter 1300 creates an exception to this proscription by providing that nothing will be construed to preclude an off-duty peace officer to work part-time for a private entity. *Id.* See 2 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Governmental Authority* §810 (Supp. 1980).

17. CAL. PENAL CODE §70; see CAL. GOV'T CODE §50922(a); CAL. LAB. CODE §3600.3(b) (there is no governmental liability for injuries sustained by peace officers while engaged in private employment).

18. See CAL. PENAL CODE §242 (definition of battery).

19. CAL. PENAL CODE §7 (definition of knowingly); 1 B. WITKIN, CALIFORNIA CRIMES, *Elements of Crime* §58 (Supp. 1978).

20. "Custodial officer" was added by CAL. STATS. 1982, c. 1353, §1, at — to CAL. PENAL

firefighters,<sup>21</sup> emergency medical technicians,<sup>22</sup> physicians or nurses engaged in rendering emergency medical care,<sup>23</sup> or mobile intensive care paramedics<sup>24</sup> engaged in the performance of their duties.<sup>25</sup> If the person committing the battery knows or should know of the status of the victim, that person is subject to a fine not exceeding one thousand dollars, imprisonment in the county jail not exceeding one year, or both fine and imprisonment.<sup>26</sup> If actual injury occurs as a result of the battery, the punishment for the battery will be increased to imprisonment in the county jail for not more than one year, a fine of not more than one thousand dollars, or imprisonment in the state prison for either sixteen months, two years, or three years.<sup>27</sup> Prior case law has interpreted off-duty peace officers' status as being primarily private and therefore not afforded these heightened protections.<sup>28</sup> In *People v. Corey*,<sup>29</sup> the California Supreme Court held that off-duty police officers employed by private associations as security guards were not entitled to the protections guaranteed on-duty patrolmen in the form of enhanced penalties for batteries committed against them.<sup>30</sup> As part of the clarification of an off-duty police officer's powers, Chapter 1353 now requires the more stringent penalties for batteries committed against peace officers while in a police uniform and concurrently performing their duties during private employment with a public entity.<sup>31</sup> To effectuate this change, Chapter 1353 expressly abrogates the decision announced in *Corey* and reinstates previous judicial reasoning that will *presumably* allow off-duty police officers the expanded safeguards that exist in their primary employment.<sup>32</sup>

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CODE §243 after being inadvertently left out of other recent amendments to that section notwithstanding an existing provision providing increased penalties for those who commit batteries upon "custodial officers engaged in the performance of their duties." See CAL. PENAL CODE §§243.1, 245.3, 831 (definition of custodial officer).

21. CAL. PENAL CODE §245.1 (definition of fire fighter).

22. *Id.* §243(c)(2) (definition of emergency medical technician).

23. *Id.* §243(c)(4) (definition of nurse).

24. *Id.* §243(c)(3) (definition of mobile intensive care paramedic).

25. Compare *id.* §243(a) with CAL. PENAL CODE §243(b).

26. *Id.* §243(b).

27. *Id.* §243(c).

28. See *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 588, 595 P.2d 975, 980, 156 Cal. Rptr. 198, 203 (1979); *People v. Corey*, 21 Cal. 3d 738, 746, 581 P.2d 644, 649, 147 Cal. Rptr. 639, 643 (1978).

29. 21 Cal. 3d 738, 581 P.2d 644, 147 Cal. Rptr. 639 (1978).

30. *Id.* at 746, 581 P.2d at 649, 147 Cal. Rptr. at 644.

31. CAL. PENAL CODE §243.

32. *Id.* See generally *People v. Townsend*, 20 Cal. App. 3d 688, 98 Cal. Rptr. 25 (1971); *People v. Hooker*, 254 Cal. App. 2d 878, 62 Cal. Rptr. 675 (1967) (holds that any rule that a peace officer only functions while on active duty would unnecessarily weaken the fabric of law enforcement). There is some debate as to the exact status of the law before *Corey*. See generally 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against the Person* §255 (Supp. 1978).

In conclusion, Chapter 1300 clarifies the duties and privileges that a peace officer maintains when engaged in off-duty employment as a security guard.<sup>33</sup> Chapter 1353 also requires increased criminal penalties for batteries committed on these off-duty peace officers while engaged in their secondary employment.<sup>34</sup>

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33. CAL. PENAL CODE §70.

34. *Id.* §243.

## Crimes; violence against school officials

Penal Code §§241.2, 243.2 (new).

SB 649 (Ellis); STATS. 1982, Ch 1087

Support: Attorney General; California Parent Teacher Association; California Peace Officers Association

Opposition: California Attorneys for Criminal Justice; Friends Committee on Legislation; State Public Defender

Existing law mandates heightened penalties for assaults<sup>1</sup> and batteries<sup>2</sup> knowingly<sup>3</sup> committed against certain governmental officials and medical personnel<sup>4</sup> engaged in the performance of their duties.<sup>5</sup> In a direct response to the increased violence on school campuses and batteries committed upon school officials,<sup>6</sup> Chapter 1087 adds to both the assault and battery provisions<sup>7</sup> by providing increased penalties against any person who knowingly commits, while on school property, an assault or battery upon teachers, student teachers, school security officers,<sup>8</sup> or school administrators in the performance of their duties.<sup>9</sup>

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1. CAL. PENAL CODE §240 (definition of assault); see 1 B. WITKIN, CALIFORNIA CRIMES, *Crimes Against the Person* §255 (Supp. 1978) [hereinafter cited as *Witkin*].

2. CAL. PENAL CODE §242 (definition of battery); see WITKIN, *supra* note 1, at §255.

3. CAL. PENAL CODE §7 (definition of knowingly), WITKIN, *supra* note 1, *Elements of Crime* §58.

4. CAL. PENAL CODE §§241(b), 243(b). The persons afforded these increased protections include peace officers, firemen, emergency medical technicians, physicians or nurses engaged in rendering emergency medical care, or mobile intensive care paramedics involved in the performance of their duties. *Id.*; see 14 PAC. L.J., REVIEW OF SELECTED 1982 CALIFORNIA LEGISLATION — (1983).

5. Compare CAL. PENAL CODE §§241(a), 243(1) with *id.* §§241(b), 243(b).

6. SCHOOL VIOLENCE, HEARING BY ASSEMBLY COMM. ON CRIMINAL JUSTICE (1979); see phone conversation with Pat Kennedy, Legislative Aide to Senator Ellis (August 30, 1982) (copy on file at *Pacific Law Journal*). See generally 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 647 (1982).

7. Compare CAL. PENAL CODE §§241.2(a), 243.2(a) with *id.* §§241(a), 243(a).

8. See *id.* §241.4 (provision mandating heightened penalties for persons knowingly committing assaults upon a peace officer of a school district).

9. *Id.* §§241.2(a), 243.2(a). See *id.* §243.5 (providing for restitution to victim or school by person committing either assault or battery on school grounds). Existing law also provides alter-

The punishment for violation of this provision is a fine not exceeding one thousand dollars, or imprisonment in the county jail not exceeding one year, or both fine and imprisonment.<sup>10</sup> Moreover, Chapter 1087, to delineate who may be afforded these heightened protections, further defines "school" for the purposes of these provisions.<sup>11</sup> The definition of a school includes any elementary school, junior high school, four-year high school, senior high school, adult school or branch thereof, opportunity school, continuation high school, regional occupational center, evening high school, or technical school.<sup>12</sup>

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native misdemeanor/felony punishment for threats directly communicated to school officials against person or property. See *id.* §71. See generally *In re Zardies B.*, 64 Cal. App. 3d 11, 134 Cal. Rptr. 181 (1976) (minor's action in preventing teacher from teaching class and refusing to be ejected from class constituted a violation of the section); WITKIN, *supra* note 1, at §880.

10. CAL. PENAL CODE §§241.2(a), 243.2(a).

11. *Id.* §§241.2(b), 243.2(b).

12. *Id.*

## Crimes; California Control of Profits of Organized Crime Act

Penal Code §§186, 186.1 186.2, 186.3, 186.4, 186.5, 186.6, 186.7, 186.8 (new).

SB 247 (Maddy); STATS. 1982, Ch 1281

Support: Attorney General; California Highway Patrol; California Peace Officers Association; Department of Finance

In an effort to punish and deter criminal activities of organized crime,<sup>1</sup> Chapter 1281 enacts the California Control of Profits of Organized Crime Act.<sup>2</sup> Chapter 1281 provides procedures for the forfeiture of property and proceeds acquired or received from criminal profiteering activity.<sup>3</sup>

Under Chapter 1281 when a person is convicted of an underlying offense<sup>4</sup> and has previously committed an act of criminal profiteering so as to constitute a pattern of criminal profiteering activity,<sup>5</sup> the prop-

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1. CAL. PENAL CODE §186.2(d) (organized crime is crime of a conspiratorial and organized nature that seeks to supply illegal goods and services, or is the crime of planning and coordinating individual efforts to conduct illegal activities).

2. *Id.* §186.

3. *Id.* §§186.2(a), 186.3-.8 (criminal profiteering activity is any act committed or attempted or any threat made for financial gain or advantage that can be charged as a crime under 19 specified Penal Code sections).

4. *Id.* §186.2(e).

5. *Id.* §186.2(b) (pattern of criminal profiteering activity means engaging in at least two incidents of criminal profiteering that (1) have the same purpose, result, victims, or are interrelated by distinguishing characteristics; (2) are not isolated events; and (3) were committed as a criminal activity of organized crime). For purposes of this section, the underlying offense must



erty interest<sup>6</sup> received from the illegal action is subject to forfeiture.<sup>7</sup> Furthermore, Chapter 1281 provides that things of value received in exchange for property obtained from proceeds derived from the pattern of criminal profiteering activity are also subject to forfeiture.<sup>8</sup>

Before a forfeiture proceeding can be conducted, Chapter 1281 requires that a petition of forfeiture be filed, by the prosecuting agency,<sup>9</sup> in conjunction with the criminal proceedings stating that the defendant has engaged in a pattern of criminal profiteering activity.<sup>10</sup> Additionally, Chapter 1281 requires notice of the forfeiture proceeding to be served on any person who has a property interest possibly subject to forfeiture.<sup>11</sup> The notice must indicate that the affected individuals may file a statement with the court stating the amount of their claimed interest and affirm or deny the allegation.<sup>12</sup> If it is impossible for the notice to be served personally or by registered mail, Chapter 1281 allows publication in a newspaper of general circulation where the property is situated.<sup>13</sup>

Under Chapter 1281, upon filing the petition for forfeiture, the prosecuting agency may seek the following civil protective measures to preserve the status quo of the property interest:<sup>14</sup> (1) an injunction preventing transfer or disposition of the interest,<sup>15</sup> (2) the appointment of a receiver to manage or preserve the assets,<sup>16</sup> and (3) the posting of a surety bond.<sup>17</sup> The court must seek to protect the interests of innocent persons in the property in making these orders.<sup>18</sup> Chapter 1281 specifically states, however, that no property solely owned by a bona fide purchaser for value will be subject to forfeiture.<sup>19</sup>

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have occurred after the effective date of this chapter and the prior act must have occurred within ten years of the commission of the underlying offense. A prior act may not be used for this section if prosecution of that act resulted in acquittal. *Id.* §186.2(b)(3).

6. *Id.* §186.3(b) (the property interest may be either tangible or intangible).

7. *Id.* §186.3(a), (b).

8. *Id.* §186.3(c).

9. *Id.* §186.2(c) (prosecuting agency means the Attorney General or the district attorney of any county).

10. *Id.* §186.4(a) (the petition must be filed with the superior court of the county where the defendant is charged).

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.* §186.6(a).

15. *Id.* §186.6(a)(1).

16. *Id.* §186.6(a)(2). Prior to any injunction being granted or receiver appointed, notice to all interested parties must be given and a hearing held to determine if there is probable cause to hold the property as forfeitable under this section. *Id.* §186.6(b).

17. *Id.* §186.6(c).

18. *Id.* §186.6(d).

19. *Id.* §186.7(a).

Within specified time periods,<sup>20</sup> any individual may file a verified claim stating an interest in the property.<sup>21</sup> If no claims are filed by innocent parties, the court will declare the property subject to forfeiture.<sup>22</sup> The defendant may either admit or deny the property is subject to forfeiture or file a claim, and if the defendant fails to admit or deny or file a claim, the court will enter a response of denial for the defendant.<sup>23</sup> If a claim is filed, a forfeiture hearing is to be held promptly after the defendant is found guilty.<sup>24</sup> At the forfeiture hearing the prosecuting agency must establish beyond a reasonable doubt<sup>25</sup> that the defendant was engaged in a pattern of criminal profiteering activity and the property interest was obtained through this activity.<sup>26</sup>

Chapter 1281 protects a person who holds a valid interest in property that may be subject to forfeiture but who is not involved in and had no knowledge of the underlying criminal activity by providing two options.<sup>27</sup> First, if the amount due the innocent person is less than the appraised value,<sup>28</sup> the person *may* pay the State or local governmental entity the value of the registered owner's equity.<sup>29</sup> Upon this payment the government will relinquish all claims to the property.<sup>30</sup> Alternatively, if the amount due to the innocent person is less than the appraised value and the person decides not to make the payment, the property will forfeit to the State and the State will pay the appraised value of the innocent person's interest in the property.<sup>31</sup>

The forfeited property is to be sold at public auction,<sup>32</sup> with the proceeds to be distributed to (1) the innocent interest holder,<sup>33</sup> (2) the Department of General Services or the local governmental agency for costs incurred in the sale of the property,<sup>34</sup> and (3) the general fund of

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20. *Id.* §186.5(a) (30 days from the date of the first publication or 30 days after receipt of actual notice).

21. *Id.*

22. *See id.* §186.5(b)(1).

23. *Id.* §186.5(b)(2).

24. *Id.* §186.5(c) (the proceedings will take place in the superior court in which the underlying criminal offense will be tried and may be tried before the same jury or a new jury).

25. *Id.* §1096 (definition of reasonable doubt).

26. *Id.* §186.5(d).

27. *Id.* §§186.7(b), (c) (the interest may be a valid lien, mortgage, security interest, or a conditional sales contract).

28. *Id.* §186.7(b) (the appraised value is determined as of the date judgment is entered on a wholesale basis either by agreement between the legal owner and the governmental entity or by the inheritance tax appraiser for the county).

29. *Id.* §186.7(b).

30. *Id.*

31. *Id.* §186.7(c).

32. *Id.*

33. *Id.* §186.8(a).

34. *Id.* §186.8(b).

the governmental entity.<sup>35</sup>

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35. *Id.* §186.8(c).

## Crimes; false financial statements

Penal Code §532a (amended).

AB 1698 (Nolan); STATS. 1982, Ch 82

Support: Attorney General; Department of Finance; International Association of Credit Card Investigators

Under existing law, it is a misdemeanor for individuals to knowingly make,<sup>1</sup> benefit from,<sup>2</sup> or reaffirm<sup>3</sup> a false financial statement in order to obtain a benefit either for themselves or for a person or business in which they are interested.<sup>4</sup> Persons convicted for violating these laws will be subject to a fine of not more than \$500, imprisonment in the county jail for not more than six months, or both.<sup>5</sup>

In an effort to stem increasing professional credit card fraud,<sup>6</sup> Chapter 82 makes it a *felony* to knowingly make, benefit from, or reaffirm a false financial statement by using a fictitious name, social security number, business name or address, or by falsely representing one's identity.<sup>7</sup> Under these circumstances, the penalties are increased to either a fine of not more than \$5,000, a term in the state prison, or both; *or* to imprisonment in a county jail for a term not exceeding one year, a fine not to exceed \$2,500, or both.<sup>8</sup> Chapter 82, however, does not preclude the applicability of other criminal law provisions,<sup>9</sup> thus permitting other charges and sanctions to be brought against an offender.<sup>10</sup>

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1. CAL. PENAL CODE §532a(1).

2. *Id.* §532a(2).

3. *Id.* §532a(3).

4. *Id.* §§532a(1), (2), (3).

5. *Id.* §532a(4).

6. Assemblyman Pat Nolan, Press Release, *Crush Credit Card Crime Says Nolan*, April 20, 1981 (copy on file at the *Pacific Law Journal*).

7. Compare CAL. PENAL CODE §532a(4) with CAL. STATS. 1919, c. 185, §1 at 277.

8. CAL. PENAL CODE §532a(4).

9. See *id.* §532a(5).

10. Examples of other charges that may be brought are theft and obtaining money, property or labor by false pretenses. *Id.* §§484, 532.

## Crimes; unauthorized cable television connections

Penal Code §593d (amended).

SB 1505 (Montoya); STATS. 1982, Ch 1342

Support: California Cable Television Association; League of California Cities; Peace Officers Association of California

Chapter 1342 is enacted in an apparent attempt to further deter the piracy of cable television services.<sup>1</sup> Additionally, in response to industry-wide complaints, Chapter 1342 is designed to curb "pirate products" that are publicly advertised and manufactured, distributed, and sold to the public for profit.<sup>2</sup>

Existing law states that it is a misdemeanor to conduct or attach any unauthorized device to any cable, wire, or other component of a franchised cable television system or television set for the purpose of intercepting or receiving a program carried by the franchised television system.<sup>3</sup> Chapter 1342 increases the penalties for these violations<sup>4</sup> and states that the prohibitions apply to both franchised and other duly licensed cable television systems.<sup>5</sup>

While prior law only specified that it was unlawful to make or attach unauthorized devices, Chapter 1342 also makes it unlawful to *maintain* an unauthorized connection or attachment.<sup>6</sup> Additionally, if the person has an authorized attachment, Chapter 1342 makes it a misdemeanor to modify or alter the existing service without authorization.<sup>7</sup> Furthermore, Chapter 1342 provides that it is unlawful to purchase or possess an unauthorized device.<sup>8</sup>

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1. See Telephone conversation with Jerry Asher, Consultant to the Senate Subcommittee on Cable Television (August 27, 1982) (notes on file at the *Pacific Law Journal*) [hereinafter cited as Telephone conversation]. See generally *Piracy of Cable Services: Hearing Before the Senate Subcommittee on Cable Television*, 41-58 (December 15, 1981) (Sen. Joseph Montoya, Chairman); Comment, *Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of Subscription Television*, 50 U. CIN. L. REV. 362, 362-63 (description of three common modes of subscription television: over-the-air subscription (STV), multipoint distribution service (MDS), and cable television); Danielson and Wheeler, *The Status of the Cable Antenna Television Industry in California and a Proposal for State Regulation*, 2 PAC. L. J. 528 (1971) (general background of cable television and California enactments).

2. See Telephone Conversation, *supra* note 1.

3. CAL. PENAL CODE §593d(a).

4. *Id.*

5. *Id.*

6. Compare *id.* with CAL. STATS. 1975, c. 974, §1, at 2299 (amending CAL. PENAL CODE §593d).

7. CAL. PENAL CODE §593d(a).

8. *Id.*

Under prior law, cable piracy was punishable by a fine of up to \$200 or by imprisonment in the county jail not exceeding 30 days.<sup>9</sup> Chapter 1342 increases the penalty by imposing on the violator a fine of \$1000, imprisonment in the county jail for up to 90 days, or both.<sup>10</sup>

Prior to the enactment of Chapter 1342, ambiguity pervaded the commercial setting<sup>11</sup> since existing law did not specify that cable television piracy products were subject to the same provisions as subscription television piracy products.<sup>12</sup> Chapter 1342 will obviate this ambiguity by specifically providing penalties for cable television piracy.<sup>13</sup> The provisions of Chapter 1342 apply to any type of signal or transmission that requires the aid of any type of a decoder, descrambler, filter, trap, or similar device used to make a cable television program or service intelligible.<sup>14</sup>

Under Chapter 1342, only franchised or other duly licensed cable television systems may authorize an interception or a manufacture of a decoder.<sup>15</sup> Furthermore, Chapter 1342 states that a party may not knowingly and willfully manufacture, distribute, sell, offer to sell, possess for sale, advertise for sale, or import into California any device, or any plan or kit for a device or printed circuit, designed in whole or in part to decode, descramble, or make intelligible any encoded, scrambled, or other nonstandard signal carried by a cable television system without authorization.<sup>16</sup>

Chapter 1342 provides that a violation of this prohibition constitutes a misdemeanor and is punishable by a fine not exceeding \$10,000, imprisonment in the county jail, or both.<sup>17</sup> A second or subsequent conviction is punishable by a fine not exceeding \$20,000, imprisonment in the county jail for up to one year, or both.<sup>18</sup>

In addition to creating these criminal penalties, Chapter 1342 establishes civil actions and penalties to prevent cable piracy.<sup>19</sup> Chapter 1342 permits a cable television system to bring an action to enjoin and restrain any violation of the provisions of this legislation.<sup>20</sup> In addi-

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9. See CAL. STATS. 1975, c. 974, §1, at 2299.

10. See CAL. PENAL CODE §593d(b).

11. See Telephone Conversation, *supra* note 1, at 41-48.

12. See CAL. PENAL CODE §593e (interception or decoding of over-the-air transmission by a subscription television service).

13. *Id.* §593d(a).

14. *Id.*

15. See *id.* §593d(a), (b).

16. *Id.* §593d(b).

17. *Id.*

18. *Id.*

19. *Id.* §593d(c), (d).

20. *Id.* §593(d).

tion, Chapter 1342 provides that a violator is liable to the franchised or other duly licensed cable television system for either three times the amount of actual damages, if any, plus attorney's fees or \$5000, whichever is greater.<sup>21</sup> Moreover, Chapter 1342 permits the franchise system to seek both an injunction and damages in the same action.<sup>22</sup> Finally, Chapter 1342 does not require that actual damages be incurred to institute either cause of action.<sup>23</sup>

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21. *Id.* §593(c).

22. *Id.* §593(d).

23. *Id.* §593(e).

